SUPREME COURT, U.S.
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No. 92-840

In The

Supreme Court of the United States

October Term, 1992

COMMONWEALTH LAND TITLE INSURANCE COMPANY,

Petitioner,

v.

KELLY P. BRADLEY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

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LIST OF PARTIES

Petitioner: Commonwealth Land Title Insurance Company[1]

Respondent: Kelly P. Bradley

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[1] Pursuant to Supreme Court Rules 15.7 and 29.1, Petitioner Commonwealth Land Title Insurance Company certifies that its parent corporation is State Title Insurance Company, and that all of its subsidiary corporations (except wholly owned subsidiaries) are Lauderdale Title Insurance Corporation and Title Insurance Company.

TABLE OF AUTHORITIES

Page(s)

CASES

Castleglen, Inc. v. Resolution Trust Corp., No. 90-4002, 1993 WL 27915 (10th Cir. Feb. 9, 1993) . . . 4, 6

D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942) 2, 3, 4, 7

FDIC v. Newhart, 892 F.2d 47 (8th Cir. 1989) 2

Graham v. Dean, 188 S.W.2d 372 (Tex. 1945) 6

Jackson Purchase Rural Elec. Coop. Ass'n v. Local Union 816, Int'l Bhd. of Elec. Workers, 646 F.2d 264 (6th Cir. 1981) 6

Kilpatrick v. Riddle, 907 F.2d 1523 (5th Cir. 1990), *cert. denied, Rogers v. FDIC*, ___ U.S. ___, 111 S. Ct. 954 (1991) 2, 6

Porras v. Petroplex Sav. Ass'n, 903 F.2d 379 (5th Cir. 1990) 2

STATUTE

12 U.S.C. § 1823(e) 2, 3

MISCELLANEOUS

Restatement of Contracts 601, Illustration 1 5

Restatement (Second) of Contracts 179, comment C(6) 6

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Respondent Kelly P. Bradley's ("Bradley" or "Respondent") Brief in Opposition does not dispute the major and underlying factual premise of the Petition for Writ of Certiorari of original Petitioner Pacific Southwest Bank ("Pacific")[2], *which is that all the written records*

[2] Respondent correctly notes that on January 27, 1993, after Pacific filed the Petition for Writ of Certiorari, Commonwealth Land Title Insurance Company ("Commonwealth" or "Petitioner") acquired by assignment the note and lien in question from Petitioner

(including the sworn statement that both Respondent and her husband signed and delivered to Petitioner's predecessor, Seguin Savings Association ("Seguin")), reflected that 114.47 acres of Paigebrook Farm was not a part of the Bradleys' homestead. Similarly, Respondent does not deny that the sworn statements she and her husband made under oath regarding their homestead are false.

Rather, Respondent attempts to justify her actions "based upon [her] husband's mistaken belief that under Texas law, because Paigebrook Farm was located within the incorporated town of Westlake, it would necessarily be categorized as urban land and, therefore, the Bradleys would only be entitled to one acre of Paigebrook Farm as their homestead." (Brief at 3.) This explanation is meaningless, however, because Respondent's affidavit is a sworn statement of *fact*, and is not meant to require Respondent or her husband to render a legal opinion. Therefore, the legal acumen of Respondent or her

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Pacific. Commonwealth therefore substitutes itself as Petitioner and real party in interest under Supreme Court Rule 15.7.

However, Commonwealth's acquisition by assignment of the note and lien in question has no bearing upon the issues before the Court because Commonwealth is contractually subrogated to all of Pacific's rights. Moreover, the "shelter doctrine" provides Commonwealth with equal standing to assert all of the arguments initially advanced by Pacific. *See, e.g., Kilpatrick v. Riddle*, 907 F.2d 1523, 1528 (5th Cir. 1990), *cert denied, Rogers v. FDIC*, ___ U.S. ___, 111 S. Ct. 954 (1991) (holding that the *D'Oench, Duhme* doctrine extends to assignees of the FDIC); *Porras v. Petroplex Sav. Ass'n*, 903 F.2d 379, 381 (5th Cir. 1990) (holding that the *D'Oench, Duhme* doctrine extends to assignees of the FDIC); *FDIC v. Newhart*, 892 F.2d 47, 50 (8th Cir. 1989) (holding that the protection afforded the FDIC under § 1823(e) transfers to subsequent purchasers).

husband is irrelevant. Moreover, Respondent's explanation is particularly disingenuous in this case because her husband is a prominent Dallas real estate attorney who is well-versed in the areas of Texas homestead law and all of its implications.

Respondent then argues that the Court should not grant the Petition because (1) Petitioner allegedly does not challenge the validity of her homestead claim, and (2) the doctrine announced in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) (hereinafter "*D'Oench*"), and its statutory counterpart 12 U.S.C. § 1823(e), does not apply to her homestead claim because Petitioner's lien on Paigebrook Farm is allegedly void (rather then voidable) under Texas homestead law. Respondent is incorrect on both counts.

First, Petitioner has always and continues to challenge Respondent's homestead claim. (See Petition at 4-9.) Respondent has apparently misread the requirements imposed upon Petitioner of providing this Court with reasons why it should grant its Petition.

Second, Petitioner's lien on Paigebrook Farm is not properly analogous to a promissory note that is void rather than voidable, however superficially appealing such a distinction may be. The so-called "real" defenses alluded to by Respondent involve situations in which an innocent borrower is excused from performance under an obligation. Forgery is a perfect example. Obviously a borrower should not be required to repay a note the borrower never signed. Here, by contrast, Respondent and her husband do not share the "innocence" of a borrower whose signature has been forged. Rather, Respondent and her husband made an actual affirmative

misrepresentation to Seguin under oath and in writing, which they then delivered to Seguin to be placed in its permanent records. In so doing, Respondent and her husband lent themselves to a scheme that would – and in this case did – mislead the banking authorities, in the classic sense of the *D'Oench* doctrine. *D'Oench*, 315 U.S. at 460.

Under these types of circumstances other courts have held that a party may not circumvent the estoppel powers of *D'Oench* by arguing that the transaction is void under applicable law. For example, in *Castleglen, Inc. v. Resolution Trust Corp.*, No. 90-4002, 1993 WL 27915 (10th Cir. Feb. 9, 1993), the court rejected the very distinction Respondent attempts to draw here between "void" and "voidable" obligations in the context of a failed lending institution. In *Castleglen*, the plaintiffs brought an action for damages or, alternatively, for recision regarding a real estate transaction. In support of their claims, the plaintiffs argued, among other things, that the agreements under which they invested in the real estate project were illegal and, hence, void. Accordingly, plaintiffs argued, as does Respondent here, that the *D'Oench* doctrine simply did not apply. The Tenth Circuit disagreed finding guidance in the well settled reasoning from the Restatement of Contracts:

> Castleglen argues that the agreements by which it invested in the Santa Fe project were illegal and VOID abinitio; thus they were beyond the protection of *D'Oench* since a legal nullity cannot logically be an "asset" which a side agreement would impair. Castleglen charges that the

agreements violated federal regulations concerning tie-in provisions, brokerage commissions and appraisal requirements under 12 C.F.R. 563.35, 563.40, and 563.9(b), as well as a number of Texas banking regulations. Tex. Admin. Code 64.1 and 64.5. The district court rejected this argument, finding an arbitrary refusal to grant relief under a contract merely in violation of the statutes would create incongruous results. 728 F. Supp. at 671.

The Utah courts recognize the general rule that "every contract in violation of law is void." *Baker v. Latses*, 206 P. 553, 555 (1922). However, this rule is not to be blindly applied. *Ross v. Producers Mutual Insurance Co.*, 295 P.2d 339, 342 (Utah 1956). Rather the practice of the Utah courts has consistently been to look to the purpose of the statute involved to determine whether it requires that contracts which violate the statute be void, or that a particular type of relief be granted. (Footnote omitted).

The purpose of the prohibitions and regulations at issue here is to ensure the solvency of savings and loan institutions by requiring that they follow specific procedures. This case thus presents the issue explored in an illustration in the Restatement of Contracts. There the example is given of a bank which enters into a type of contract which is forbidden by statute. In the Restatement's view an "[a]ction can be maintained on the [contract], since otherwise the creditors and shareholders of the bank, for whose protection the statute is enacted, would be injured." Restatement of Contracts 601, Illustration 1. *See also, McCormick v. Life Insurance Company of America*, 308 P.2d 949, 952 (Utah

> 1957) (arbitrary refusal to grant relief under contracts merely because of violation of statute often brings incongruous results); Restatement (Second) of Contracts 179, comment C(6). The statutory purpose of protecting the insurance fund and depositors would not be furthered in this case by declaring the contract void since this would only deplete the resources of the institution. Rather the appropriate remedy should be the statutorily prescribed one which focuses on ending continuing violations and disciplining the bank officers who approve such transactions. (Footnote omitted).

Id. at *11.[3] *See also Jackson Purchase Rural Elec. Coop. Ass'n v. Local Union 816, Int'l Bhd. of Elec. Workers*, 646 F.2d 264, 267 (6th Cir. 1981) ("it is not the case that all unlawful agreements are ipso facto void. If the denial of relief is disproportionately inequitable the right to recover will not be denied."); *Graham v. Dean*, 188 S.W.2d 372, 373 (Tex. 1945) ("The rule that a court will not entertain a suit growing out of an illegal contract is not always applicable where the parties are not in pari delicto.").

Applying the principle announced in *Castleglen* to the facts in this case compels an identical result. A borrower may not wholesale circumvent the holding in *D'Oench* by merely labelling the obligation in question as void under another law. *Kilpatrick v. Riddle*, 907 F.2d at 1529 ("It is not the nature or enforceability of an agreement between a

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[3] Moreover, under the current state of the law, if not reversed, the Fifth Circuit's decision in this case will conflict with the Tenth Circuit's decision in *Castleglen*.

bank and borrower that controls the application of the *D'Oench, Duhme* doctrine . . . "). Rather, a borrower may *only* escape the application of *D'Oench* under a defense that is consistent with the policy underlying that doctrine – in other words, where the borrower is innocent and did not lend herself to a scheme that was likely to mislead the banking authorities. Here, as a result of Respondent's own affirmative misrepresentations, she does not fall within the class of innocent borrowers who are exempt from the holding in *D'Oench*. Therefore she may not escape its application by arguing that Petitioner's lien is void under Texas homestead law.

Accordingly, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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